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In the Supreme Court
OF THE
United States

OCTOBER TERM 1978

NO. 78-1489

DONALD ANGUS McNULTY, Petitioner

v.

STATE OF HAWAII, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Hawaii, for which review is sought, is *State* v. *McNulty*, 60 Haw. ____, 588 P.2d 438 (No. 5978, December 28, 1978), and is reprinted in Appendix A of the Petition.

JURISDICTION

The jurisdictional requisites are set forth adequately in the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defense.*

QUESTIONS PRESENTED

1. Whether this Court should review the decision of a State Court that has given full consideration to the issues and decided them accurately?

2. Whether this Court should review the decision of a State Court that has given full consideration to the issues and decided them fairly?

STATEMENT OF THE CASE

The statement of the case has been set forth adequately in the Petition.

ARGUMENT

THE TRIAL COURT'S FAILURE TO GIVE A SPECIFIC BURDEN OF PROOF INSTRUCTION IS CONSTITUTIONALLY HARMLESS AND THEREFORE, DEFENSE COUNSEL'S FAILURE TO OBJECT TO THAT OMISSION DOES NOT AMOUNT TO INEFFECTIVE REPRESENTATION.

The jury instruction which is the subject of this appeal is one which omitted a specific burden of proof instruction on the presecution's burden of disproving self-defense. The instruction, as a whole, did charge the prosecution with the burden of proving every element of the crime charged beyond a reasonable doubt. *State* v. *McNulty*, 60 Haw. ____, 588 P.2d 438, 442, n.5 (1978). As such, this instruction is of a fundamentally different and distinct constitutional category than the instructions in *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) and *Corsa* v. *Anderson*, 443 F.Supp. 176 (E.D. Mich. 1977), cases on which the Petitioner relies.

In *Mullaney* v. *Wilbur*, a Maine statute required a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation." 421 U.S. 684. In its instructions to the jury, the trial court in *Mullaney* v. *Wilbur* stated that if the prosecution established that the homicide in question was both intentional and unlawful, malice aforethought was to be conclusively implied *unless the defendant proved by a fair preponderance of the evidence* that he acted in the heat of passion on sudden provocation. *Id.* at 686. (Emphasis supplied.) In *Corsa* v. *Anderson*, the jury instruction charged that if a man assaults another person with a deadly weapon, "the law presumes that such person so assaulting intended to take life . . . ." 443 F.Supp. at 177. Like the instruction in *Mullaney* v. *Wilbur*, the instruction in *Corsa* v. *Anderson* had the effect of proving one of the elements of the crime charged, to wit, the intent to kill. In both cases, the

defendant had to *disprove* a presumption of guilt as to an element of the crime charged — malice aforethought and the intent to kill, respectively.

No such constitutional infirmity as requiring the defendant to prove his innocence appears in the jury instructions in the present case. The general instruction charged: "The burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every material element of the crime charged . . . ." *State* v. *McNulty*, 60 Haw. ____, 588 P.2d at 442, n.5. The general instruction did not create a presumption of guilt as to any element of the crime charged and consequently did not place Petitioner in a position of having to prove his innocence. *United States* v. *Levin*, 443 F.2d 1101, 1107 (8th Cir.), *cert. denied*, 404 U.S. 944 (1971). Neither did the instruction expressly put the burden of proving self-defense on the Petitioner. *Id.* In comparison to the constitutional proportions of the jury instructions in *Mullaney* v. *Wilbur* and *Corsa* v. *Anderson*, the jury instruction in the present case is of a much lesser magnitude. Insofar as the present jury instruction is of a fundamentally different and distinct constitutional category, the Petitioner has mistaken this case to be of equal constitutional proportions as that of *Mullaney* v. *Wilbur*.

1. **THE TRIAL COURT'S FAILURE TO GIVE A SPECIFIC BURDEN OF PROOF INSTRUCTION IS CONSTITUTIONALLY HARMLESS.**

In *United States* v. *Jackson*, 569 F.2d 1003 (7th Cir.), *cert. denied*, ____ U.S. ____, 98 S.Ct. 3096, 57 L.Ed.2d 1137 (1978), the Court considered whether the failure of a United States District Court to give the exact jury instruction challenged on appeal here amounted to plain error. In deciding that it did not constitute plain error, the Seventh Circuit looked to the following factors: (1) the trial court did read a self-defense instruction to the jury, thereby presenting the defendant's theory of the case to the factfinder; (2) defense counsel in closing argument stated that the prosecution had the

burden of proving the absence of self-defense beyond a reasonable doubt; (3) and the evidence of guilt was overwhelming. 569 F.2d at 1010.

This approach to the omitted specific burden of proof jury instruction involves a much more detailed analysis of the record than as set forth by Petitioner in his Petition. A jury instruction on self-defense was given. *State* v. *McNulty*, 60 Haw. ____, 588 P.2d at 442. A strong case that evidence of guilt is overwhelming could be made. And, although not part of the record, it is possible to ascertain whether or not defense counsel in his closing statement at trial mentioned the State's burden of disproving self-defense.

In line with the ruling in *United States* v. *Jackson* above, the following courts have consistently refused to find plain error in cases where a specific burden of proof instruction relating to the accused's interposed defense was omitted without objection: *Government of Virgin Islands* v. *Cruz*, 478 F.2d 712, 717 — 18 (3d Cir. 1973); *United States* v. *Rodriguez*, 446 F.2d 859, 860 (9th Cir. 1971), *cert. denied*, 404 U.S. 1021 (1972); *Esposito* v. *United States*, 436 F.2d 603, 604, (9th Cir. 1970); *United States* v. *Conversano*, 412, F.2d 1143, 1148 — 49 (3d Cir.), *cert. denied*, 396 U.S. 905 (1969); *Nordeste* v. *United States*, 393 F.2d 335, 338 — 40 (9th Cir.), *cert. denied*, 393 U.S. 878 (1968); *State* v. *Love*, 285 Minn. 444, 449 — 52, 173 N.W.2d 423, 426 — 27 (1970 .

2. **A CLAIM OF INEFFECTIVE COUNSEL PREDICATED ON DEFENSE COUNSEL'S FAILURE TO OBJECT TO A CONSTITUTIONALLY HARMLESS BURDEN OF PROOF INSTRUCTION IS NOT WELL TAKEN.**

The approach taken by the United States District Court for the Eastern District of Michigan in *Corsa* v. *Anderson*, *supra*, to the claim of ineffective counsel for failure to object to a jury instruction, is inapposite to the present case and therefore, not persuasive. The jury instruction in that case did in fact violate

the defendant's constitutional presumption of innocence. It was plain error for the trial court to give that instruction. In view of the important constitutional right at stake, a claim of ineffective counsel could logically be predicated on counsel's failure to object to that instruction.

Unlike *Corsa* v. *Anderson*, the jury instruction in the present case, with the omitted specific burden of proof instruction, was constitutionally harmless. It is therefore illogical to predicate a claim of ineffective counsel on defense counsel's failure to object to it. Insofar as the facts in *Corsa* v. *Anderson* are inapposite to the present case, the reasoning of that court is likewise not applicable.

3. THE DECISION OF THE HAWAII SUPREME COURT IS FAIR AND JUST.

The constitutional right to the assistance of counsel in a criminal case is satisfied only when such assistance is "effective." *Powell* v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1936). "Effective" counsel does not mean errorless counsel but counsel whose assistance is "within the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). Even if it was error for trial counsel to waive his objection to the specific burden of proof instruction, that error was harmless.

Petitioner's final basis for asserting ineffective assistance of counsel is trial counsel's failure to call the victim's former attorney to testify as to the victim's violent propensities. The decision to call a witness in a criminal trial, however, is a matter peculiarly within the judgment of counsel and, accordingly, will rarely be second-guessed on appeal. *Sheriff* v. *Wyrick*, 524 F.2d 186, 190 (8th Cir.), *cert. denied*, 424 U.S. 923 (1976).

Viewing the record as a whole, defense counsel's conduct at trial did not fall below that standard of ordinary competence demanded of attorneys in criminal cases. *State* v. *Kahalewai*, 54

Haw. 28, 501 P.2d 977 (1972). In balancing defense counsel's actions against the competing interests in the administration of criminal justice, the Hawaii Supreme Court has reached a fair and just result.

CONCLUSION

The Hawaii Supreme Court accurately and fairly decided the issues in this case. Inasmuch as the Petitioner retains no separate federal grounds upon which to petition this Court, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 16th day of April, 1979.

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